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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

314 U.S. 646

No. 246

JOSEPH J. KOPKE and HENRY HLAVACEK,
Petitioners,

vs.

THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

Opinion of Supreme Court of Illinois Appended

WM. SCOTT STEWART,
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SUBJECT INDEX.

PAGE

Petition for writ of certiorari..... 1

Summary statement of the matter involved..... 1

Reasons relied on for the allowance of the writ.. 2

Prayer for writ..... 2

Brief in support of petition..... 4

I. The opinion of the court below (herein, Appendix, p. 27)..... 4

II. Jurisdiction 5

III. Statement of the case..... 6

IV. Specification of errors..... 11

V. Argument 12

Summary of Argument:

Point A. There was a total failure of proof below, admitting, for the sake of argument, that the complaining witness was injured in the manner claimed by him..... 12

Point B. By permitting the prosecutor to proceed to trial upon numerous improperly joined counts and allowing the State to introduce incompetent evidence, the petitioners were deprived of due process of law.... 21

Point C. The entire prosecution, we respectfully submit, is but a mask resulting in cruel and unusual punishment..... 22

Conclusion 25

Table of Cases Cited.

PAGE

Abie State Bank v. Bryan, 282 U. S. 765, 773..... 6
Adams v. Barratt, 5 Ga. 404..... 13

Baltimore & Ohio Southwestern R. Co. v. Burtch, 263 U. S. 540, 543..... 7
Bowen v. S., 24 Tex. App. 542, 7 S. W. 247..... 12
Brinkmeier v. Missouri Pac. R. Co., 224 U. S. 268, 270 7
Broad River Power Co. v. South Carolina ex rel. Daniel, 281 U. S. 537, 540..... 6

Cadwallader v. Harris, 76 Ill. 370..... 23
Canada v. C., 22 Grat. (Va.) 899..... 13
Canadian Bank of Commerce v. McCrea, 106 Ill. 281. 23
Chicago, Burlington & Quincy R. Co. v. City of Chicago, 166 U. S. 226, 231, 232..... 5
Chicago, Burlington & Quincy Ry. v. Illinois ex rel. Drainage Com'rs, 200 U. S. 561, 580, 581..... 6
Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U. S. 226, 242..... 7
Chicago, G. W. R. Co. v. Basham, 249 U. S. 164.... 5
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474 6
Chick v. S., 7 Humph (Tenn.) 161..... 12
Citizens' Bank of Michigan City, Ind. v. Opperman, 249 U. S. 448, 450..... 5
Commonwealth v. Newell, 7 Mass. 245..... 13
Crosby v. People, 137 Ill. 325..... 16

Dahlberg v. People, 225 Ill. 485.....14, 15, 24
Davis v. Wechsler, 263 U. S. 22, 24, 25..... 6
Dewey v. DesMoines, 173 U. S. 193, 197, 198..... 6
Dower v. Richards, 151 U. S. 658, 667..... 6

PAGE

Equitable Life Assurance Society v. Brown, 187 U. S. 308 8
Erie Railroad Co. v. Purdy, 185 U. S. 148, 154..... 6

Foster v. P., 50 N. Y. 598, M. 529..... 12
Fox Film Corporation v. Doyal, 286 U. S. 123, 126.. 5

Godfrey v. People, 63 N. Y. 207..... 13
Graham v. Gill, 223 U. S. 643, 645..... 6
Great Northern Ry. Co. v. Donaldson, 246 U. S. 121, 124 6

Harris v. Commonwealth, 150 Va. 580, 142 S. E. 354 19
Hicks v. Silliman, 93 Ill. 255..... 17

International Harvester Co. v. Missouri ex. inf. Attorney General, 234 U. S. 199, 206, 207..... 6
Iowa-DesMoines Nat. Bank. v. Bennett, 284 U. S. 239 5
Iowa-DesMoines Nat. Bank v. Stewart, 283 U. S. 813 5

Johnson v. New York Life Ins. Co., 187 U. S. 491, 495 5

Kaufman v. Tredway, 195 U. S. 271, 273..... 6

Lamb v. People, 96 Ill. 73..... 17
Lamkin v. People, 94 Ill. 501..... 22
Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 282..... 6
Lessieur v. Price, 12 How. 59, 72..... 5

Mammoth Mining Co. v. Grand Central Mining Co., 213 U. S. 72, 73..... 7
McCoy v. People, 175 Ill. 224..... 16
Missouri K. & T. Ry. Co. v. Haber, 169 U. S. 613, 639 6
Molette v. State, 49 Ala. 18..... 13
Moore v. Dempsey, 261 U. S. 86..... 20
Moore v. People, 146 Ill. 600..... 20

PAGE

Ohio Public Service Co. v. State of Ohio ex rel. Fritz, 275 U. S. 12 5

Patterson v. State of Alabama, 294 U. S. 600, 602 .. 6
People v. Bentley, 357 Ill. 82, 103 17
People v. Connors, 246 Ill. 9 17
People v. Jankowski, 327 Ill. 68 22
People v. Ryan, 239 Ill. 410 20
People v. Saylor, 319 Ill. 205 13
People v. Walker, 361 Ill. 482 17
People v. Wyherk, 347 Ill. 28 17
People v. Yuskauskas, 268 Ill. 328 15
Puget Sound Power & Light Co. v. King County, 264 U. S. 22, 23, 25 5

Rankin v. State, 139 S. W. (2d) 811 17
Rex v. Lee, 1 Leech, 3d Ed. 71 12

Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 673 6
Smiley v. Kansas, 196 U. S. 447, 454 7
Smith v. Laatsch, 114 Ill. 271 23
Southern Railway Co. v. Lunsford, 297 U. S. 398 7
State v. Ailey, 3 Husk (Tenn.) 8 13
State v. Briley, 8 Porter (Ala.) 472 13
State v. Cody, 18 Or. 506, 23 P. 891, 24 P. 895 13
State v. Girkin, 1 Ired. (N. C.) 121 13
State v. Jones, 70 Ia. 505, 30 N. W. 750 13
State v. Thompson, 30 Mo. 470 13
St. Louis I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 277 ..... 6, 7
St. Louis, San Francisco & T. Ry. Co. v. Seale, 229 U. S. 156, 161 6

Thompson v. Weller, 85 Ill. 197 23
Turley v. People, 188 Ill. 628 20

Union Pacific R. Co. v. Huxoll, 245 U. S. 535, 538 .. 6

PAGE

Ward v. Board of County Com'rs of Love County, Okla., 253 U. S. 17, 22 6
Walter v. Northern Ins. Co. of N. Y., 370 Ill. 283, 288 23
West Chicago St. Railroad Co. v. Illinois ex rel. City of Chicago, 201 U. S. 506, 519, 520 6
Wood v. Chesborough, 228 U. S. 672, 676, 680 6

TABLE OF PARTS OF CONSTITUTION AND STATUTES CITED.

Xiv. Amendment (Fed Constitution) 2, 11, 21
5 Henry Iv., C. 5 13
Ill. Rev. Stat. 1937, Chap, 38, Sec. 55, Par. 20 18
Ill. Rev. Stat. 1937, Chap. 38, Sec. 448, Par. 207 ..... 18, 22
Ill. Rev. Stat. 1937, Chap. 38, Sec. 58, Par. 23 22
Ill. Rev. Stat. 1937, Chap. 38, Sec. 581, Par. 1 23
Ill. Rev. Stat. 1937, Chap. 38, Par. 23 24

TEXT BOOKS AND ENCYCLOPEDIAS CITED.

May's, Criminal Law, Third Edition, Section 217, p. 208 12
4 Bl. Com. 205 ..... 12, 13
2 Bish. New Cr. Law, 1001 12
Stephen's Dig. Cr. Law, cc. 25, 26 13
40 L. R. A. (N. S.) 1132 18

APPENDIX.

Opinion of Illinois Supreme Court 27

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

JOSEPH J. KOPKE and HENRY HLAVACEK,
Petitioners,

vs.

THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

A.

Summary statement of the matter involved.

Your petitioners, Joseph J. Kopke and Henry Hlavacek, were convicted in the Criminal Court of Cook County, Illinois, and sentenced to the penitentiary for assault with intent to commit mayhem. The judgment of the trial court was affirmed by the Supreme Court of Illinois on February 18, 1941. A petition for rehearing was denied and the judgment was made final on April 8, 1941. Petitioners are officials of the Amalgamated Meat Cutters Union, 638, affiliated with the American Federation of

Labor. The complaining witness, Czeslaw Mikolajczyk (Abst. 12), is a butcher by trade and had been a member of the union, working at various markets on extra jobs secured through the union. A dispute arose as to the nature of the work he was doing and he claimed that he was injured by petitioners. Both petitioners testified at the trial and denied the use or possession of any gun and denied kicking. They said that the complaining witness became excited when he was questioned about what he was doing in there about the butcher shop, and that he lifted up a shovel. Kopke said that he hit the complaining witness with his hand at the time in order to protect himself and to prevent the use of the shovel.

B.

Reasons relied on for the allowance of the writ.

In this Honorable Court the judgment is assailed upon the ground that the petitioners, and each of them, were denied due process of law and equal protection of the laws in contravention of the XIV. Amendment.

1. The Federal question was presented to the State court (Abst. 142), and, although petitioners' contentions were overruled, no mention is made in the opinion of the Federal question. It is respectfully contended that the State court has decided a Federal question not in accord with applicable decisions of this Honorable Court.

2. It is respectfully submitted that the State court construed and enforced State laws in such a manner as to discriminate against your petitioners and thereby violated their right to due process of law as guaranteed them by the Federal Constitution.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of

this Honorable Court, directed to the Supreme Court of Illinois, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 25971, The People of the State of Illinois, Defendant in Error, *vs.* Joseph J. Kopke and Henry Hlavacek, Plaintiffs in Error, and that the said judgment of the Supreme Court of Illinois may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WM. SCOTT STEWART,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

JOSEPH J. KOPKE and HENRY HLAVACEK,
Petitioners,

vs.

THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinions of the court below.

The opinion of the court below will be found in the record and in the official reports of that State (376 Ill. 171) and in the North Eastern Reporter (33 N. E. (2nd) 216) and is appended herewith (p. 27).

II.

Jurisdiction.

The judgment was entered in the trial court (the Criminal Court of Cook County, Illinois), but a supersedeas was allowed by the Supreme Court of Illinois

and, as appears from the record herein, that Honorable Court affirmed the judgment on February 18, 1941. Under the rules that judgment was not made final until a petition for rehearing was denied on April 8, 1941. The Supreme Court of Illinois has the record, a certified transcript of which is filed herewith.

We respectfully submit that this Honorable Court has decided that if a petition for rehearing is entertained by the higher court of a state, its judgment does not become final until the petition for rehearing is denied (*Puget Sound Power & Light Co.* v. *King County,* 264 U. S. 22, 23-25; *Citizens' Bank of Michigan City, Ind.* v. *Opperman,* 249 U. S. 448, 450; *Ohio Public Service Co.* v. *State of Ohio ex rel. Fritz,* 275 U. S. 12; *Chicago G. W. R. Co.* v. *Basham,* 249 U. S. 164; *Iowa-DesMoines Nat. Bank* v. *Stewart,* 283 U. S. 813; *Iowa-DesMoines Nat. Bank* v. *Bennett,* 284 U. S. 239).

Where the court of last resort, as the Illinois Supreme Court in the case at bar, affirms a final judgment of an inferior state court, the judgment of the highest court is the one reviewable (*Lessieur* v. *Price,* 12 How. 59, 72, 13 L. Ed. 893; *Fox Film Corporation* v. *Doyal,* 286 U. S. 123, 126, 52 S. Ct. 546, 76 L. Ed. 1010).

In the case at bar, the federal question was specifically raised in the motion for new trial (Abst. 138) in the trial court and was reasserted in the assignment of errors made in the State Supreme Court (Abst. 141), and therefore we respectfully submit that the federal question was timely and properly raised, even though the Illinois Supreme Court did not expressly pass upon the federal question (*Chicago, Burlington & Quincy R. Co.* v. *City of Chicago,* 166 U. S. 226, 231, 232; *Johnson* v. *New York Life Ins. Co.,* 187 U. S. 491, 495; *International Harvester*

Co. v. *Missouri ex inf. Attorney General,* 234 U. S. 199, 206, 207; *Erie Railroad Co.* v. *Purdy,* 185 U. S. 148, 154).

Of course, we realize that this Honorable Court must confine itself to the specific federal question properly raised in the state courts (*Dewey* v. *DesMoines,* 173 U. S. 193, 197, 198).

But, we respectfully submit, the failure of the State court to pass upon the federal question is not conclusive upon this Honorable Court (*Chicago, Burlington & Quincy Ry.* v. *Illinois ex rel. Drainage Com'rs,* 200 U. S. 561, 580, 581; *West Chicago St. Railroad Co.* v. *Illinois ex rel. City of Chicago,* 201 U. S. 506, 519, 520; *Wood* v. *Chesborough,* 228 U. S. 672, 676-680). This Honorable Court will determine the inquiry for itself (*Abie State Bank* v. *Bryan,* 282 U. S. 765, 773; *Broad River Power Co.* v. *South Carolina ex rel. Daniel,* 281 U. S. 537, 540; *Lawrence* v. *State Tax Commission of Mississippi,* 286 U. S. 276, 282; *Patterson* v. *State of Alabama,* 294 U. S. 600, 602; *Ward* v. *Board of County Com'rs of Love County, Okla.,* 253 U. S. 17, 22; *Davis* v. *Wechsler,* 263 U. S. 22, 24, 25).

We respectfully submit that we are not requesting this Honorable Court to re-examine facts tried by the jury. Our respectful contentions concern the legal effect and sufficiency of the facts and the theory upon which the case was submitted below and are questions of law for this Honorable Court (*Kaufman* v. *Tredway,* 195 U. S. 271, 273; *Dower* v. *Richards,* 151 U. S. 658, 667; *Graham* v. *Gill,* 223 U. S. 643, 645; *St. Louis, San Francisco & T. Ry. Co.* v. *Seale,* 229 U. S. 156, 161; *St. Louis I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 277; *Chicago, M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, 474; *Seaboard Air Line Ry.* v. *Padgett,* 236 U. S. 668, 673; *Union Pacific R. Co.* v. *Huxoll,* 245 U. S. 535, 538; *Baltimore &*

Ohio Southwestern R. Co. v. *Burtch,* 263 U. S. 540, 543; *Brinkmeier* v. *Missouri Pac. R. Co.,* 224 U. S. 268, 270; *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 242; *Missouri K. & T. Ry. Co.* v. *Haber,* 169 U. S. 613, 639; *Smiley* v. *Kansas,* 196 U. S. 447, 454; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter,* 229 U. S. 265, 280; *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, 124; *Southern Railway Co.* v. *Lunsford,* 297 U. S. 398; *Mammoth Mining Co.* v. *Grand Central Mining Co.,* 213 U. S. 72, 73).

Our respectful claim is that the highest court of our State has refused to pass upon the federal question, which was properly raised, which is a question of substance not heretofore determined by this Honorable Court. As your Honors know, the use of certiorari to correct error is not infrequent in criminal cases.

So, in the case at bar, there can be no question but what there has been:

(1) A final judgment or decree;

(2) The decision sought to be reviewed is by the highest court of the state in which decision could be had;

(3) The judgment or decree was rendered in a "suit" involving a "case" or "controversy";

(4) The case presents a substantial federal question;

(5) The federal question sought to be reviewed was properly raised and preserved in the state courts; and

(6) The decision of the highest court of the state does not rest upon a state ground which inde-

pendently and adequately supports the judgment or decree.

So, as your Honors will perceive, the question in the case at bar narrows itself down to whether or not a substantial federal question is submitted, which question, of course, is for decision upon the entire record in the light of the decisions of this Honorable Court and in the exercise of discretion and the supervisory power of this Honorable Court.

Of course, we realize, as was said by Mr. Chief Justice White in *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308:

> "Mere allegation of a Federal question will not suffice; there must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction."

We respectfully submit that the inquiry whether a substantial Federal question is involved in the case at bar is not dependent entirely upon the merits of the case as they now appear from this Petition. If your Honors will take jurisdiction, we respectfully submit that the merits of our case will more fully appear. We only ask to have a chance to print the record and show the injustice done, upon which injustice we respectfully claim the writ.

III.

Statement of the case.

Petitioners Joseph J. Kopke and Henry Hlavacek were convicted in the Criminal Court of Cook County and sentenced to the penitentiary for assault with intent to commit mayhem. The indictment (consisting of six counts)

charges various assaults and conspiracy. The jury found a verdict (Abst. 6) under the fourth count (Abst. 4), charging that the petitioners kicked the complaining witness with the intent to disable his testicles.

The petitioners are officials of the Amalgamated Meat Cutters Union, 638, affiliated with the American Federation of Labor. The complaining witness, Czeslaw Mikolajczyk (Abst. 12), is a butcher by trade and had been a member of the union, working at various markets on extra jobs secured through the union. Prior to the conflict he had withdrawn from the union and was not eligible to work as a union man. On the day in question, Saturday, January 6, 1940, he was working as an extra in a butcher shop known as the General Market, 3708 26th Street, Chicago. This shop was conducted by two partners, John Matousek (Abst. 40), and Richard Dusek (Abst. 46), who testified on behalf of the People. The market was supposed to be a union shop and employed a number of butchers. The partners belonged to an employer's association. There is a dispute in the testimony as to the nature of the work being done by the complaining witness. A telephone call was received at union headquarters that a non-union man was working at the market. The petitioners went over to investigate. After securing permission, they went through the store into the rear. They found the complaining witness in a back room, where the controversy took place. Those in the market were not in a position to see what transpired in the back room. According to the complaining witness, Kopke pointed a gun at him in the rear room and kicked him between his legs (Abst. 14).

Both petitioners testified (Abst. 53 and 64) and denied the use or possession of any gun and denied kicking. They said that the complaining witness became excited

when being questioned about what he was doing in and about the butcher shop and that he lifted up a shovel. Kopke said that he hit the complaining witness with his hand at the time in order to protect himself and to prevent the use of the shovel.

The People did not claim that there was any permanent disablement. Disfigurement is not alleged or claimed.

Charles Chval, who described himself as an osteopathic physician and obstetrician and retired minister (Abst. 28), testified to an examination made of the complaining witness. The petitioners produced Dr. Baker (Abst. 81) and Hatton, the X-ray man (Abst. 79) from the Cook County Hospital, where the State's Attorney sent the complaining witness three days after the trouble. Dr. Glasser gives his expert opinion in the way of an affidavit (Abst. 130), that the means supposed to have been used are incapable of producing the result alleged to have been intended, and that the complaining witness is a malingerer.

Those who were in the butcher shop in addition to the proprietors, who testified for the People, are Aldrich Drahotusky (Abst. 33), and Mary Melichar (Abst. 43). Anton Lazansky (Abst. 49), a butcher employed on that day, testified on behalf of the petitioners. Many others are shown to have been present, but were not called. The petitioners surrendered themselves to the police and made statements to them and to the State's Attorney. Some effort was made by the prosecutor to show variations but we contend that said statements were substantially in accordance with the testimony of the petitioners at the trial.

The petitioners established their good reputation by a number of witnesses (Abst. 84 to 89) and no witness was called by the State upon this subject.

IV.

Specification of errors.

The petitioners respectfully contend:

1. Prior to the trial a written motion to quash was made (Abst. 8) and overruled. A motion was also made for a bill of particulars (Abst. 10) and overruled. These rulings are complained of.

2. It is also contended that the evidence is insufficient, and the court erred in the matter of instructions. The petitioners sought to have the prosecutor elect. This also was refused. Rulings as to the admission and exclusion of evidence are alleged to be error. Affidavits were filed and it is contended that the court erred in denying the motion for new trial and in entering judgment.

3. That each of the errors deprived the defendants of due process of law as guaranteed by the constitution and laws of this State and the 14th Amendment to the Constitution of the United States.

V.

ARGUMENT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

A.

There was a total failure of proof below, admitting, for the sake of argument, that the complaining witness was injured in the manner claimed by him.

Petitioners have been sentenced to the penitentiary on verdicts finding them guilty of assault with intent to commit mayhem. We review briefly the nature of the crime involved by the following quotation from May's Criminal Law, Third Edition, Section 217, page 208:

"Mayhem is defined by Blackstone (4 Bl. Com. 205) as 'the violently depriving another of the use of such of his members as may render him the less able, in fighting, either to defend himself or to annoy his adversary.' Amongst these members were included a finger (*Bowen* v. *S.*, 24 Tex. App. 542, 7 S. W. 247), an eye (*Chick* v. *S.*, 7 Humph. (Tenn.) 161), a foretooth, and those parts which are supposed to give courage. But cutting off the ear or the nose is not mayhem at common law, since the loss of these tends only to disfigure, but not to weaken (4 Bl. Com. 205. See also 2 Bish. New Cr. Law, 1001, and notes). It has been held that a statutory mayhem, based on the common law offence, is not committed by cutting the throat (*Rex* v. *Lee*, 1 Leach, 3d ed. 71), or breaking the skull (*Foster* v. *P.*, 50 N. Y. 598, M. 529),

there being no deprivation of any member. The injury must be permanent in order to constitute the offence (*State* v. *Briley*, 8 Porter (Ala.), 472.) * * * The offence is now almost universally, in this country, defined by statute, and generally treated as an aggravated assault. In many States the statutes cover cases not embraced by common law, as the biting off an ear or the slitting of the nose, if the injury amounts to a disfigurement (*State* v. *Girkin*, 1 Ired. (N. C.) 121; *State* v. *Ailey*, 3 Heisk. (Tenn.) 8).

"Mayhem, at common law, was punishable in some cases as a felony,—an eye for an eye, and a tooth for a tooth,—and in others as a misdemeanor (4 B. Com. 205; *Commonwealth* v. *Newell*, 7 Mass. 245, C. 109, 482. Compare *Adams* v. *Barratt*, 5 Ga. 404; *State* v. *Thompson*, 30 Mo. 470; *Canada* v. *C.*, 22 Grat. (Va) 899). But if the offence is made a felony in this country, the punishment is defined by statute. It is doubtless, generally, a misdemeanor, unless done with intent to commit a felony (*Ibid.;* Stephen's Dig. Cr. Law, cc. 25 and 26).

"Under the statute in New York, the injury must have been done by 'premeditated design' and 'of purpose.' Hence, if done as the result of an unexpected encounter, or of excitement produced by the fear of bodily harm, the offence is not committed. (*Godfrey* v. *People*, 63 N. Y. 207.) So under the statute, 5 Henry IV, c. 5, malice *prepense* was said by Lord Coke to mean 'voluntarily and of set purpose.' (Coke, 3 Inst. 62. See also *Godfrey* v. *People, ante; Molette* v. *State*, 49 Ala. 18; *State* v. *Jones*, 70 Ia. 505, 30 N. W. 750; *State* v. *Cody*, 18 Or. 506, 23 P. 891, 24 P. 895.)"

In *People* v. *Saylor*, 319 Ill. 205, it was held that castration comes within the statute on mayhem. That case involved the completed crime. In *Dahlberg* v. *People*, 225

Ill. 485, this Honorable Court held that the defendant could not be guilty of an attempt to commit mayhem because the means (red pepper) could not have accomplished the crime.

In the case at bar, the disablement was not accomplished. If Kopke had been able to disable the testicles of the complaining witness by means of a kick, it may be that very slight evidence in addition to the result would be sufficient to conclude that he so intended.

We respectfully quote from the *Dahlberg* case (488):

> "It is quite evident from the testimony in this record that it was not in plaintiff in error's power, and could not have been her intention, to have the pepper remain in Grace's eyes any longer than it would take him to remove it in the ordinary course of events. * * * It can hardly be contended that the pepper thrown by plaintiff in error, and which affected Hinton so slightly would if it had struck the eye of William Grace, for whom it was apparently intended, have destroyed or even seriously injured his eyesight.
>
> "We do not find it necessary to consider the question as to whether plaintiff in error could be convicted of an attempt at mayhem, if, when she threw the pepper, she thought she had employed adequate means and intended to destroy the eyesight of William Grace, when, in fact, she used inadequate means for the purpose. There is no testimony in the record tending to show that she so believed and intended, and while in criminal cases the criminal intention may be manifested by the circumstances connected with the perpetration of the offense without any positive testimony as to intention, it certainly could not be inferred because plaintiff in error used inadequate means that she intended to use adequate means."

The *Yuskauskas, Saylor* and *Connors* cases, in which

the convictions were affirmed, are easily distinguished from the case at bar.

We respectfully submit that the specific intent required was not proved in the case at bar, by either direct or circumstantial evidence. There is nothing in the evidence from which it can be inferred that Kopke had in his mind the specific intent required, even assuming for the purpose of argument that he kicked the complaining witness. Dr. Glasser, a specialist, gave as his opinion on the motion for new trial (Abst. 130) that such a result as was alleged to have been intended is impossible. This, we submit, is common knowledge.

In *People* v. *Yuskauskas*, 268 Ill. 328, it was insisted that the evidence did not show that the crime was committed with premeditation and that there was no intent on the part of the defendant to commit the crime of mayhem. He bit off part of the nose. We quote (331):

> "Plaintiff in error, who was a witness in his own behalf, did not deny the assault upon his wife or that he committed the crime with which he was charged, but testified that his wife had been going out with other men and he went to the house with the purpose of frightening her and beating her up, and that he had no intention of biting off her nose or injuring her in any manner. The question whether plaintiff in error had the intent to commit the crime with which he was charged was a question for the jury among other facts in the case, and while the plaintiff in error testified on the trial that he did not intend to injure her, the jury evidently thought that his actions spoke louder than words. The verdict was justified by the evidence. In fact, it can hardly be seen how the jury could have found otherwise than that plaintiff in error was guilty as charged. Criminal intent may be manifested by the circumstances connected with the perpetration of the offense without any positive testimony as to such intent. (*Dahlberg* v. *People*, 225 Ill. 485; *McCoy* v. *People*,

> 175 *id.* 224; *Crosby* v. *People*, 137 *id.* 325.) In the latter case it was said, on page 336 of the opinion: 'It is not necessary to a conviction, however, that an express intention need be proved. Every sane man is presumed to intend the natural and probable consequences of his act, and it has been uniformly held, therefore, that the intent may be inferred from the acts of the person charged with crime as well as by words or declarations.'"

We respectfully submit that in the case at bar there were no such actions that could speak louder than words, even if the testimony of the complaining witness be taken as true. A kick does not indicate that the petitioner intended to maim or disable the testicles. As a matter of fact, such result could hardly be expected. Such a kick might cause intense pain, and is no doubt a cruel act, but it does not follow that the kicker intends to permanently disable the testicles.

We respectfully quote from an affidavit (Abst. 130) by Dr. Julius M. Glasser, which was filed by leave of court, and read and considered in disposing of the motion for new trial. There were no counter affidavits filed. First permit us to call attention to the qualifications of Dr. Glasser as an expert, as shown by the affidavit (Abst. 130); a specialist who after his graduation from Northwestern University pursued studies in Europe and is on the staff of numerous hospitals:

> "This affiant states that the male organs, including the testicles, are so situated and arranged upon the body of a man as to afford a natural protection from injury. This protection is afforded by the location of same and the fact that they are freely movable. This affiant, assuming a hypothetical person clothed in the manner described by the witnesses as to the complaining witness, is of the opinion that it is a physical impossibility to inflict any injury with the foot by kicking, which injury would deprive the

> complaining witness of the sexual organs, particularly the testicles. This affiant is of the opinion that it is a physical impossibility to accomplish the severance of any part of said organs by means of kicking or beating or any such external violence as is described in the above case."

Although this medical opinion was not formally made a part of the record until after the verdict was returned, your Honors will recognize the opinion as one embraced in common knowledge. As was said in *People* v. *Bentley*, 357 Ill. 82, 103:

> "This court will take judicial notice of laws of science and of nature and of the universal experience of mankind. (*Hicks* v. *Silliman*, 93 Ill. 255.)"

In the case at bar, permit us to assume for the purpose of argument that the kick caused a permanent injury to the testicles. (No such claim is made.) The petitioner, if confronted with a mayhem charge, could claim that he did not intend such a result. The intent would be a question for the jury under proper instructions. Such a defense would do him no good on a lesser charge involving injury, for the acts would speak for themselves. When the law seeks to exact a more severe penalty for a crime such as mayhem requiring a specific intent, he should be heard to say he had no such intent. His actions should be permitted to speak for him.

In *Rankin* v. *State*, 139 S. W. (2d) 811, the eye of the complaining witness was so badly injured by a bottle that it had to be removed. The Court of Criminal Appeals of Texas discusses the matter of intent and notices the difference between cases in which the mayhem is accomplished and those in which the means failed.

In *People* v. *Connors*, 246 Ill. 9, the defendant was convicted of mayhem. He tore an ear from the complaining

witness. His defense was an alibi and the elements of the offense are not discussed.

We respectfully submit that there is a total failure of proof as to Hlavacek. If Kopke was not guilty, Hlavacek could not be (*People* v. *Walker,* 361 Ill. 482; *People* v. *Wyherk,* 347 Ill. 28). Hlavacek can not be said to have aided or joined in any conspiracy for the purpose of committing mayhem in the absence of proof (*Lamb* v. *People,* 96 Ill. 73).

The statute under which these petitioners were convicted, omitting parts not applicable, is as follows:

> "An assault with intent to commit * * * mayhem * * * shall subject the offender to imprisonment. * * *" (Ill. Rev. Stat. 1937, Chap. 38, Sec. 58, Par. 23.)

An assault is defined by our statute as follows:

> "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 55, Par. 20.)

The mayhem statute, omitting the parts not applicable, is as follows:

> "Whoever, with malicious intent to maim * * * cuts off or disables a limb or other member of another person shall be imprisoned * * *." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 448, Par. 207.)

We omitted the disfigurement from the statute because there is nothing about disfigurement in the indictment. The parts involved in the case at bar are not ordinarily exposed to view.

There is a note in 40 L. R. A. (N. S.) 1132, entitled:

> "Mayhem as depending upon the means or instrument used to inflict the injury."

from which we quote:

> "At common law mayhem was defined as the violent deprivation of one of the use of such of his members as may render him less able in fighting to defend himself or annoy his adversary. 26 Cyc. 1595.
>
> "The 40 L. R. A. (N. S.) statutes upon the subject, however, have extended the crime to include injuries which would not have that effect, but result merely in disfiguring the person.
>
> "In some early English cases, it is held that to support a charge of maiming under their statute, the injury must have been inflicted by means of some instrument."

In *Harris* v. *Commonwealth*, 150 Va. 580, 142 S. E. 354, reported in 58 A. L. R. 1316, with a note, the defendant struck complaining witness with a stick, inflicting a slight bruise over the collar bone. The skin was not broken. After citing authorities to the effect that the wound did not come within the mayhem statute, the court said (1318):

> "It is probable that the reason for this seemingly narrow construction of the word 'wound' can be thus explained: First, that statutes defining new crimes should be strictly construed, and also because of the manifest disposition to charge and prosecute as felonies under this statute offenses which theretofore had been classed as simple assaults—misdemeanors. The true purpose and meaning of the statute was doubtless conceived to be to define and punish as felonies those acts which had theretofore been considered misdemeanors only in those cases where it also appeared that there was the felonious intent to maim, disfigure, disable, or kill."

Our point is that mayhem is a particularly heinous crime, carrying a heavy penalty. Other assaults should not be held to be with intent to commit the crime in the absence of clear proof of the specific intent required.

There is an element of deliberation and premeditation as to the purpose of the cutting to constitute mayhem. In some of the old statutes and in some states now, a lying in wait is required.

Cases decided in this State under the above quoted section 58 indicate the policy of the law and, although not directly in point, illustrate our contention.

In *Moore* v. *People,* 146 Ill. 600, the defendant was convicted of assault with intent to commit manslaughter. The State contended that that came within "other felony." In holding that the statute did not apply, this Honorable Court said (601):

> "To constitute the offenses, or any of them, as defined in this statute, the intent must be established, and whilst not necessary that this shall be done by direct evidence, such as threats and the like, as it may be inferred from the facts and circumstances proven, yet the specific intent is necessary to complete the offense. An assault with intent to commit murder, rape, mayhem, robbery or larceny is one which necessarily depends on deliberation, and as all these offenses which are specifically named by that section are those which require deliberation and premeditation it becomes a question of construction whether the term 'or other felony' can include any offense other than one committed with deliberation or premeditation. When a section, so far as it particularizes, has reference entirely to offenses committed with a deliberate intent, general language referring to any other felony in like manner has reference to offenses committed with premeditation or deliberate intent,—that is, with what is included as legal premeditation or deliberation."

Another case illustrating that the specific intent must be manifest is that of *People* v. *Ryan,* 239 Ill. 410, holding that the evidence was not sufficient to convict a pickpocket of *assault with intent to rob* in a case where the

attempt at *stealing from the person* failed. Also see *Turley* v. *People*, 188 Ill. 628, where there was a failure of proof as to specific intent in an assault to rob.

B.

By permitting the prosecutor to proceed to trial upon numerous improperly joined counts and allowing the State to introduce incompetent evidence, the petitioners were deprived of due process of law.

Of course, your Honors know that when labor officials are accused of crime, questions collateral to the charge and bound to be considered by the jury and prejudices are liable to influence the result. The prosecution has no right to use a scatter-shot gun and convict on general principles. They have no right to increase an ordinary assault charge to one as serious as mayhem. Your Honors have a record of the background of these petitioners. It is difficult to believe that they could be so indifferent to all decency as to walk into a store where they were well known, intent upon the commission of such a terrible crime. Such conduct was unnecessary and would be foolhardy. At any rate, the petitioners can now claim that the evidence was highly conflicting, the proof of their guilt is not clear and they had a right to a trial free from the many prejudicial errors shown. It is contended that they did not receive due process of law as guaranteed by the constitution and laws of this State and the Fourteenth Amendment to the Constitution of the United States.

C.

The entire prosecution, we respectfully submit, is but a mask resulting in cruel and unusual punishment.

This Honorable Court, in *Moore* v. *Dempsey,* 261 U. S. 86, perceived that a proceeding legal in form could be but a mask. In the case at bar, the punishment for an attempt to commit an offense is made greater than the punishment for the completed offense.

It is evident that the defendants were sentenced to the penitentiary for the crime of assault with intent to commit mayhem under the following statute:

> "An assault with an intent to commit murder, rape, mayhem, robbery, larceny, or other felony, shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 58, Par. 23.)

Mayhem is defined as follows in the statute:

> "Whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one nor more than twenty years, or fined not exceeding $1,000, and confined in county jail not exceeding one year." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 448, Par. 207.)

So it will be seen that mayhem is a misdemeanor and not a felony (*Lamkin* v. *People,* 94 Ill. 501). This fact is recognized in *People* v. *Jankowski,* 327 Ill. 68, which went first to the Appellate Court.

The question respectfully submitted is, what is the proper construction? At common law mayhem was a fel-

ony. Common law crimes exist in this State. Can it be that the common law crime is meant? If so, the proof in the case at bar falls short and the indictment is insufficient.

We respectfully quote from *Walter* v. *Northern Ins. Co. of N. Y.*, 370 Ill. 283, 288:

> "It is a familiar rule of construction that statutes in derogation of the common law cannot be construed as changing the common law beyond what is expressed by the words of such statute or is necessarily implied from what is expressed. (*Thompson* v. *Weller*, 85 Ill. 197; *Canadian Bank of Commerce* v. *McCrea*, 106 *id.* 281; *Cadwallader* v. *Harris*, 76 *id.* 370.) It is also a familiar rule of construction that in construing statutes in derogation of the common law, it will not be presumed that an innovation thereon was intended further than that which is specified or clearly to be implied. *Smith* v. *Laatsch*, 114 Ill. 271; *Cadwallader* v. *Harris, supra.*"

We respectfully contend that the crime of attempt to commit the misdemeanor mayhem as defined by our statute falls under the following statute:

> "Whoever attempts to commit any offense prohibited by law, and does any act towards it but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one or more than five years; in all other cases, by fine not exceeding $300, or by confinement in the county jail not exceeding six months." (Ill. Rev. Stat. 1937, Chap. 38, Sec. 581, Par. 1.)

If such construction is proper, it was error to receive the verdict in the case at bar. The court erred in overruling the motion for new trial and in sentencing the defendants to the penitentiary.

The mixup of Statutes is evident by a reference again to *Dahlberg* v. *People,* 225 Ill. 485. The defendant in the *Dahlberg* case was sentenced to the penitentiary for an attempt. This Honorable Court seems to have regarded an attempt to commit mayhem as an attempt to commit a felony where no express provision is made by law for the punishment of such attempt. We have seen that mayhem is not a felony and that the statutes do make provision for an assault to commit mayhem (Ill. Rev. Stat. 1937, Chap. 38, par. 23).

We respectfully submit that the record shows not only that the complaining witness was malingering and seeking money on a false claim, but the prosecutor, in his anxiety to secure a conviction, lent himself to the original unlawful scheme and deprived these petitioners of due process of law. What should have commenced and ended in a police court case was magnified to a penitentiary sentence.

Conclusion.

Appreciating the limits upon the jurisdiction of this Honorable Court, we respectfully represent that petitioners are labor officials who have worked up from the ranks and who have led clean lives, including service to their country, (all of which is shown by the record). They are in the penitentiary claiming to be innocent. We respectfully submit that the trial court deprived these petitioners of their rights and the Supreme Court of Illinois decided the case contrary to the decisions of that Honorable court in such a manner as to deprive these petitioners of due process of law as guaranteed by the Federal Constitution.

Respectfully submitted,

JOSEPH J. KOPKE and
HENRY HLAVACEK,
Petitioners,

WM. SCOTT STEWART,
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APPENDIX.

Docket No. 25971—Agenda 7—December, 1940.

The People of the State of Illinois, Defendant in Error v. Joseph J. Kopke, *et al.*, Plaintiffs in Error.

Mr. Chief Justice Gunn delivered the opinion of the court:

Plaintiffs in error, Joseph J. Kopke and Henry Hlavacek, were convicted in the criminal court of Cook county of assault with intent to maim one Mikolajczyk, and sentenced to imprisonment in the penitentiary. They have sued out this writ of error.

The facts as shown by the record are substantially as follows: The complaining witness was working in the back room of a butcher shop at 3708 West Twenty-sixth street. About 10:00 a. m., plaintiffs in error, who were representatives of the Butchers' Union, came into the shop and asked the owner if they might go into the back room, and upon receiving permission went back to where Mikolajczyk was working. What happened is disputed. Mikolajczyk testified Kopke wanted to know what he was doing, called him a foul name and told him to come out, pulled a gun and kicked him between the legs, and Hlavacek also hit him; that he was also struck across the face with the gun. He cried for help and police. Plaintiffs in error admit going back, but denied they kicked him or had a gun. They say after some argument Mikolajczyk reached for a shovel, and Kopke, in self-defense, struck him in the face with his hand. Mikolajczyk went to a doctor, who found swelling of the testicles and also lacerations on the face.

The voice of Mikolajczyk calling for help was heard by a number of persons in the front room of the butcher shop. The evidence discloses plaintiffs in error went to where Mikolajczyk was working, that the latter called loudly for help, and showed physical evidence of being assaulted.

Both plaintiffs in error were business agents for the Butchers' Union and called for the purpose of ascertaining whether some one was working contrary to their rules and contract with the owner. Mikolajczyk was not in good standing although previously a member of the union. Both plaintiffs in error established they had a reputation as being peaceable and law-abiding citizens. It is urged the evidence was insufficient to justify a conviction; that the jury was improperly instructed; that the indictment was bad, and that there was error in rulings upon the evidence.

The indictment charges plaintiffs in error made the assault by means of shoes worn upon their respective feet, with malicious intent to disable the testicles of Mikolajczyk, and thereby maim him; in plain language by kicking Mikolajczyk in the testicles. It is claimed a crime is not charged, because the disabling of testicles does not come within the statute, and the means used indicate an absence of the specific intent required by the statute.

The Mayhem statute provides: "Whoever, with malicious intent to maim * * * cuts off or disables a limb or other member of another person shall be imprisoned," etc. (Ill. Rev. Stat. 1939, chap. 38, par. 448.) The statute under which the indictment was returned is as follows: "An assault with intent to commit murder, rape, mayhem, robbery, larceny, or other felony, shall subject the offender to imprisonment in the penitentiary," etc. Ill. Rev. Stat. 1939, chap. 38, par. 58.

At common law castration constituted mayhem. (1 Hawkins Pleas of Crown, 175; 4 Blackstone's Com. 205.) Under the Illinois Mayhem statute we have held the testicles are members of the body, to maim or disable which constitutes mayhem. (*People* v. *Saylor,* 319 Ill. 205.) Under similar statutes other jurisdictions have held the same. (*State* v. *Sheldon,* 54 Mont. 185, 169 Pac. 37; *Cole* v. *State,* 62 Tex. Crim. 270, 138 S. W. 109; *Choate* v. *Commonwealth,* 176 Ky. 427, 195 S. W. 1080.) It being the law that to disable the testicles of a person constitutes mayhem, an assault with intent to so disable the same would constitute an attempt within paragraph 58 of the Criminal Code, *supra.*

It is claimed the kicking, as alleged, does not show an intent to commit mayhem. The charge is an assault to disable with intent to maim. Accomplishment of the mayhem is not necessary. The assault charged, is the crime. The means alleged was threatening the complaining witness with a gun and kicking him. The means used to disable is immaterial if effective. *United States* v. *Scroggins,* Fed. Case 16243; *Carpenter* v. *People,* 31 Col. 284, 72 Pac. 1072; *Neblett* v. *State,* 47 Tex. Crim. 573, 85 S. W. 813.

The law being settled that the member of the complaining witness alleged to have been disabled came within the provisions of the statute it became a question for the jury to decide whether the assault was made, the intent of the defendants, and whether the means used would effect a disablement, as charged in the indictment. (*Lathrop* v. *People,* 197 Ill. 169.) In *People* v. *Yuskauskas,* 268 Ill. 328, we held criminal intent may be manifested by the circumstances connected with the perpetration of the offense, without any positive testimony as to intention. (See Ill. Rev. Stat. 1939, chap. 38, div. 2,

sec. 9.) There was no error in refusing to quash the indictment and submitting the case to the jury.

Objection is made to People's instruction No. 17 given upon the question of the credibility to be given to defendants when they testify in their own behalf; to People's instruction No. 5 telling the jury a defendant may be convicted even though he may have a good reputation, and to People's instruction No. 22 dealing with the impeachment of witnesses. It is needless to set these instructions out at length, as all but instruction No. 5 is supplemented by other instructions. Instruction No. 17 is covered by People's instruction No. 20 as well as by defendants' instructions Nos. 43 and 46. The matter covered by instruction No. 22 is covered by defendants' instruction No. 36, and instruction No. 5 is approved in *Hirschman* v. *People*, 101 Ill. 568. The law on these specific questions was properly and accurately covered by the series given by both sides, and this is sufficient. *People* v. *Lenhardt*, 340 Ill. 538.

Serious objection is made to People's instruction No. 16, which is as follows: "The court instructs the jury, as a matter of law, that the rule which clothes every person accused of crime with the presumption of innocence, and imposes upon the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but it is a humane provision of the law intended, as far as human agencies can, to prevent an innocent person from being convicted." An able and exhaustive review of the cases since *Spies* v. *People*, 122 Ill. 1, where it was given, is set forth to prove it has never been approved since. It is claimed it limits the presumption of innocence to which a defendant in a criminal case is entitled. If this instruction stood alone it might require further

study. However, defendants, by their instructions Nos. 27, 31, 32 and 34, so thoroughly defined the extent and term and effect of the presumption of innocence that the emphasis, if any, is placed upon the defendants' rights rather than the infringing of them. Under the circumstances no error was committed. The attention of the jurors was directed to the whole series by People's instruction No. 2, and they were also told each instruction should be considered with relation to all others given.

Exception is taken to a conversation between defendant Kopke and a woman in front of the shop, in which she said: "Why don't they leave the poor man earn his living?" This was immediately after defendants in error came from the back room, and ordered the other employees to take off their aprons and go home. The cases cited of *People* v. *Pfanschmidt*, 262 Ill. 411. *People* v. *Harrison*, 261 *id.* 517, and *People* v. *Frugoli*, 334 *id.* 324, do not sustain plaintiffs in error. These cases all involved conversations or statements which were not made by the defendant, from which an admission by silence was claimed. Here, the defendants engaged in conversation, and it was so closely related to the occasion of defendants' business at the shop as to come within the *res gestae.*

The action of the court in sustaining an objection to proving on cross-examination that Mikolajczyk had started suit for damages against plaintiffs in error, as a fact tending to show interest, might be criticized, but that was amply shown from Mikolajczyk being the complaining witness, and, at best, was only cumulative, and, in our opinion, harmless.

We have examined the evidence in this record and are

unable to say the verdict is not sustained by the evidence. Other errors in the trial of the cause are urged, to which we have given careful study, but which we do not believe well founded.

We find no substantial error in the record, and the judgment of the criminal court of Cook county is affirmed.

Judgment affirmed.

(17)

FILED
JUL 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 246

JOSEPH J. KOPKE and HENRY HLAVACEK,
PETITIONERS,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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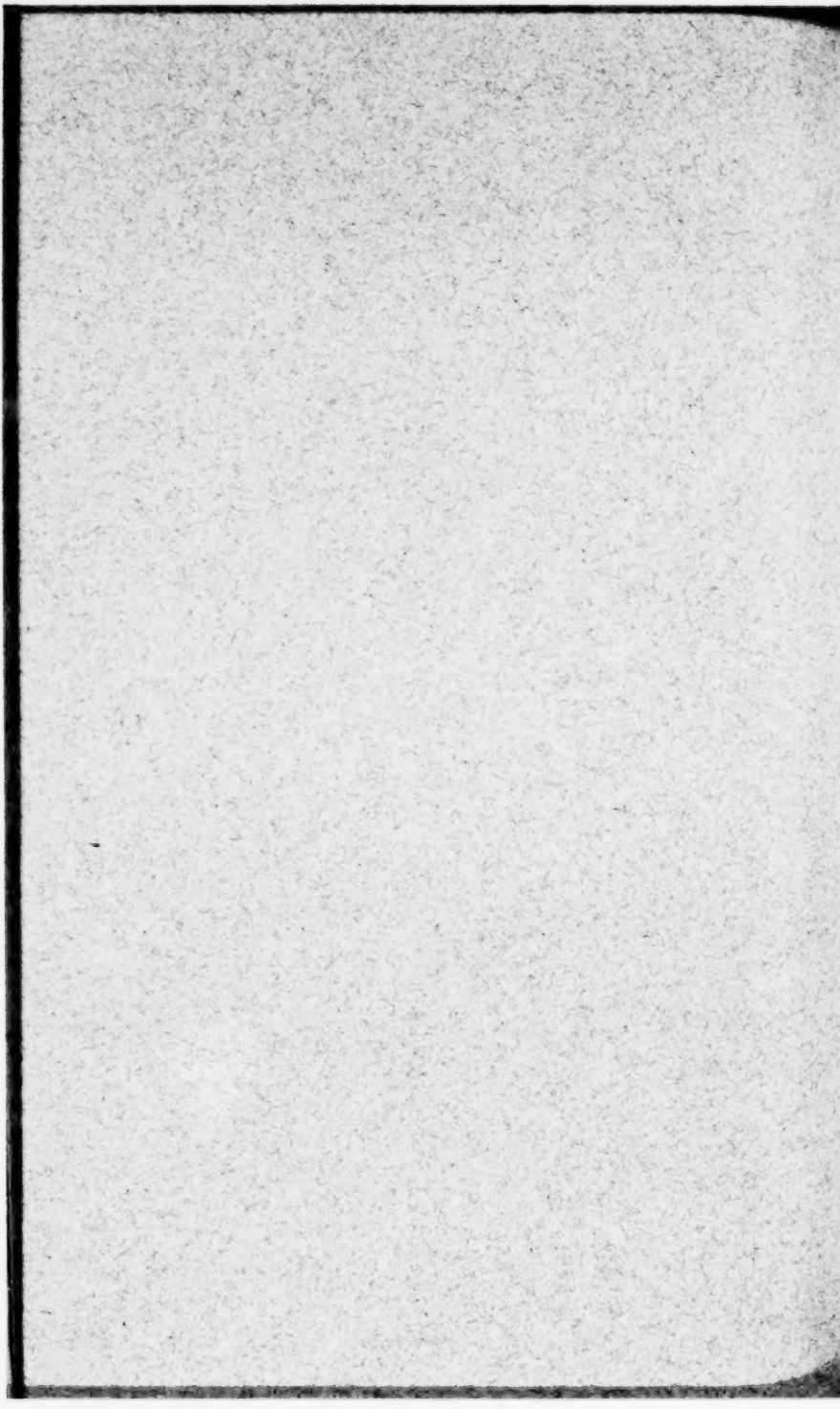

SUBJECT INDEX

PAGE NO.

Statement of the case 1

Argument 8

Point A—The petitioners were proven guilty of the crime as charged in the indictment beyond a reasonable doubt 9

Point B—The counts in the indictment were properly joined and no incompetent or prejudicial testimony was introduced into evidence 11

Point C—The petitioners were given a fair and impartial trial and were not deprived of any state or federal constitutional rights.

Conclusion 13

TABLE OF CASES CITED

PAGE No.

Carpenter v. People, 31 Colo. 284; 72 Pac. 1072.....10
Coate v. Commonwealth, 176 Ky. 427; 195 S. W. 1080.. 9
Cole v. State, 62 Tex. Crim. 270; 138 S. W. 109..... 9
Crosby v. People, 137 Ill. 325.....10
Neblett v. State, 47 Tex. Crim. 573; 85 S. W. 813.....10
People v. Sailor, 319 Ill. 205..... 9
People v. Sheldon, 54 Mont. 189; 169 Pac. 37..... 9
People v. Superior Court, 234 Ill. 186..... 8
U. S. v. Scroggins, Fed. case No. 16243.....10

TEXT BOOKS CITED

4 Blackstone's Commentary, 205..... 9
1 Hawkins Plea of Crown, 175..... 9

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STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Under Point III of their brief, the petitioners make their statement of the case, setting forth just such facts

as appear to be most beneficial to their case. We therefore ask leave to submit a complete statement of the facts in the case.

The complaining witness, Czeslaw Louis Mikolajczyk (Abst. 12), of 3036 West Cullerton Street, who had been a butcher for the past thirty-three years, had joined the Butchers' Union in 1928 and received a withdrawal card from the union in August, 1938. On January 6, 1940 he was working in John's Quality Market at 3708 West 26th Street, cleaning pipes in the ice box in the rear of the butcher shop, when he saw the defendants Hlavacek and Kopke enter the room. Kopke said, "What are you doing here", and Hlavacek said, "Come out, you son-of-a-bitch", and that Kopke then pulled out a gun and pointed it at him and then kicked him between the legs, which he indicated to the jury is that region of the penis and testicles (Abst. 14). He shouted for help and police and then slumped down on a chair in the vestibule by the telephone. When he got up to get his coat Kopke hit him with a revolver on the left side of the cheek, which knocked him down right in front of the vestibule door and caused him to bleed from the nose and month. Thereupon Hlavacek stood over him and shook some letters (alleged to have been written by Mikolajczyk) in his face. There were about 12 or 15 ladies in the butcher shop at the time and one of them shouted, "Don't kill

the man, what's the matter." Mikolajczyk then got up and got his coat and left the place, going directly to Dr. Charles August Chval's office, about a half block from the butcher shop. The doctor told him to remove his trousers and then examined his testicles and administered first aid to the cut on his face and the inside of his cheek. The doctor gave him a letter to the Lawndale Avenue Police Station and he went from the doctor's office to the police station, where he talked to the police officers in Polish. While he was there Kopke and Hlavacek were brought into the station.

Dr. Charles August Chval (Abst. 28) testified that Mr. Mikolajczyk came to his office on January 6 between 12 and 1 o'clock. He observed that his face was bloody and also his hands, and that the left corner of his lip was lacerated, and when he looked into his mouth his left cheek was also lacerated and bleeding. He assisted him in taking off his clothes and observed that his testicles were enlarged and swollen. He palpitated and on palpitation Mikolajczyk expressed pain. He checked the hemorrhage in the cheek and prescribed treatment for the testicles and abdomen. He again examined the defendant the next Sunday at his home and found the same condition prevailing in the abdomen and testicles as the day before and that his mouth was still sore from the laceration. On his third visit to Mikolajczyk he made a test and found occult blood in the urine.

Aldridge Drahotusky (Abst. 33) testified that he had been a butcher for about five years and that on the morning of January 6, 1940 he was employed and working in the shop of John Matousek at 3708 West 26th Street; he said that he saw Mikolajczyk working in the store on this day but that he did not work behind the counter or handle or sell meat. He stated he saw the defendants Kopke and Hlavacek come into the store at about noon on that date and go into the back room. He then heard a lot of hollering and heard Mikolajczyk call out for help twice and then saw Mikolajczyk come running from the back room where he heard him say, "They are beating me", and fall on the floor next to him, and that he then saw Kopke draw his hand back into his coat pocket. He observed that Mikolajczyk was bleeding from the mouth and he asked Kopke if he had hit him, to which Kopke replied, "No, he is just making out."

John Matousek (Abst. 40), one of the owners of the butcher shop located at 3708 West 26th Street, testified that Mikolajczyk came into his store on January 6 and that he told him to finish cleaning the ice box, for which he would fix him some meat to take home. He stated that Mikolajczyk did not sell meat in the shop that day. He saw Kopke and Hlavacek come into the store that morning at about 11 or 12 o'clock and go into the back room and shortly thereafter he heard Mikolajczyk

hollering for help. He then went into the back room and observed that Mikolajczyk was bleeding from the mouth and that Kopke and Hlavacek were there at the time.

Mary Melchiar (Abst. 43) testified that she was in John Matousek's butcher shop on January 6, 1940 and saw the defendants Kopke and Hlavacek come into the store and go into the back room and that thereafter she heard raised voices as though in argument and saw Mikolajczyk come running from the back room, saying they were hitting him, and she observed that he was doubled up and had his hands in front of him and that he fell on his knees as he came out of the door. She saw Kopke and Hlavacek come after him and heard one of them say, "This is a scab shop. These men should take their aprons off and go home." She thereupon said to Kopke, why don't they leave the poor man earn his living and that Kopke told her to keep her "trap" shut.

Richard Dusek (Abst. 46), the other owner of the butcher shop, testified that he saw the defendants Kopke and Hlavacek come into the shop and go into the back room and shortly thereafter heard Mikolajczyk holler for help and that when he went into the back room he saw Mikolajczyk sitting, holding himself between the legs and that he heard one of the women customers in the store state, "It's a shame to hit a poor man like that", and that he heard Kopke tell her to keep her mouth shut.

Joseph J. Kopke (Abst. 53) testified that on January 6 they received a telephone call that a non-Union man was working at 3708 West 26th Street and that he and Hlavacek then proceeded on foot to this place, which is about three blocks from their office. They entered the shop and on receiving permission went into the back room where they saw Mikolajczyk working at a kettle with water in it. Hlavacek asked him in English, "What are you doing here. Do you have a withdrawal card?" and that Kopke said the same words in Polish; that Mikolajczyk answered he was working. Kopke told Mikolajczyk that he had a withdrawal card and "our men can't work with you". He stated that Mikolajczyk then became angry and turned around and picked up a shovel. Kopke stated he then struck Mikolajczyk and that Mikolajczyk then dropped the shovel and faked a fall over the door sill. He testified that he then said to Hlavacek, "Let's order the boys off the job and get out of here. This is too much acting". As he was leaving the store Mrs. Melchior shouted, "You racketeers! You hoodlums!" and that he said, "Lady, if I were you I would mind my own business. We are not racketeers; we are not hoodlums; we are merely doing our duty." He then left the store and about 3:30 that afternoon he received a message that Captain Maloney of the Lawndale Station wanted to speak to him. He met his associ-

ate in front of the Lawndale Station, where he saw Mikolajczyk and explained the matter to Captain Maloney.

Henry Hlavacek (Abst. 64) corroborated the testimony of Joseph J. Kopke.

Martin Baker (Abst. 81) testified he was Department Physician of the Cook County Hospital X-ray Department and that he examined the X-ray made of the complaining witness and found no apparent pathology in the lumbar sacral spine and that there was no evidence of the traumatic injury to the bones of the spinal column in the lumbar sacral area, which is in the small of the back.

ARGUMENT

The petitioners, on page 7 of their brief, contend that the highest court in the State of Illinois did not pass upon the federal question which they properly raised in the trial court and in their assignment of errors in the Illinois Supreme Court.

We respectfully point out to this Honorable Court that an examination of the opinion of the Supreme Court of Illinois in the instant case will disclose that the federal questions raised under Points A and B in the petitioners' argument were expressly passed upon in that opinion, and further, that all other points raised by the defendants were passed upon in the opinion as follows:

> "Other errors in the trial of the cause are urged to which we have given careful study, but which we do not believe well founded."

In *People* v. *The Superior Court*, 234 Ill. 186, at page 195 the Court said:

> "The general rule is, when a judgment is affirmed by this court all questions raised by assignment of error, and all questions that might have been so raised, are to be regarded as finally adjudicated against the appellant or plaintiff in error. A judgment or decree having been affirmed by this court, must be regarded as free from all error. *Gould* v. *Sternberg*, 128 Ill. 510."

A.

Under heading "A" in their Argument, the petitioners, after quoting various definitions of mayhem from May's Criminal Law, Third Edition, Section 217, page 208, contend that in the case at bar disablement was not accomplished because kicking the complaining witness in the testicles could not have accomplished the crime.

The petitioners support their position by the affidavit of Julius Glasser, not properly a part of the record, and introduced after the verdict in support of a motion for a new trial and rely primarily upon *Dahlberg* v. *People*, 225 Ill. 485 which is not parallel to the case at bar in this particular. We respectfully submit this contention, as well as the affidavit of Julius Glasser is without merit. At common law castration constituted mayhem (1 Hawkins Pleas of Crown, 175; 4 Blackstone's Com. 205). Under the Illinois Mayhem Statute, it has been held the testicles are members of the body, to maim or disable which constitutes mayhem. (*People* v. *Sailor*, 319 Ill. 205.) Under similar statutes other jurisdictions have held the same. (*State* v. *Sheldon*, 54 Mont. 189; 169 Pac. 37; *Cole* v. *State*, 62 Tex. Crim. 270; 138 S. W. 109; *Coate* v. *Commonwealth*, 176 Ky. 427; 195 S. W. 1080.) It being the law that to disable the testicles of a person constitutes mayhem, an assault with intent to so disable the same would constitute an attempt within Paragraph 58 of the Criminal Code.

We further respectfully submit the question of whether a person kicked in the testicles could be maimed was a question of fact strictly for the jury to determine. The jury heard the testimony of Dr. Chval but did not hear the ridiculous opinion of Julius Glasser.

Following petitioners' argument that disablement of the testicles could not be accomplished by the acts alleged, it is suggested that the petitioners could not have had in mind the specific intent required. This contention, we respectfully submit, is again without merit. Every person is presumed to know the natural consequences of his acts.

In *Crosby* v. *People*, 137 Ill. 325, the court said:

> "It is not necessary to a conviction, however, that an express intention need be proved. Every sane man is presumed to intent the natural consequences of his act, and it has been uniformly held, therefore, that the intention may be inferred from the acts of the person charged with crime as well as by words or declarations."

The charge is an assault to disable with intent to maim. Accomplishment of mayhem is not necessary. The assault charged is the crime. The means alleged was threatening the complaining witness with a gun and kicking him. The means used to disable is immaterial if effective. (*U. S.* v. *Scroggins*, Fed. case No. 16243; *Carpenter* v. *People*, 31 Col. 284; 72 Pac. 1072; *Neblett* v. *State*, 47 Tex Crim. 573; 85 S. W. 813.)

B.

The counts in the indictment were properly joined and no incompetent or prejudicial testimony was introduced into evidence.

Under this point the petitioners state the trial court permitted the prosecutor to proceed to trial upon numerous improperly joined counts and allowed the State to introduce incompetent evidence, thereby depriving them of due process of law, but they do not point out or suggest in what manner the counts of the indictment were improperly joined or where incompetent evidence was introduced.

We respectfully submit the indictment and each and every count is in the language of the Statute and relate to the one transaction and each count is laid under a *videlicit*, which clearly and distinctly describes the manner in which the crime was committed and is definitely sufficient for the petitioners to understand the acts they were charged with and to defend the same. It is scarcely possible to allege the facts more specifically without unduly and unnecessarily enlarging upon them.

We further respectfully submit an examination of the record will disclose that no prejudicial evidence was introduced.

MIX-UP AS TO STATUTES

The petitioners' endeavor, at this point, to confuse the issue by injecting immaterial and unnecessary matters into the argument, does not merit a reply.

The Statute provided for "an assault with an intent to commit mayhem"; the indictment so charged; the facts so proved; and the verdict so read. The punishment was provided by Statute and the verdict complied with the Statute. Whether it be a felony or a misdemeanor, and the amount of the punishment prescribed by the statute, is a matter for the Legislature, which does not concern the judiciary.

CONCLUSION

In conclusion, we sincerely urge the petitioners were proven guilty beyond a reasonable doubt by overwhelming evidence of the crime as charged in the fourth count of the indictment. They were charged with the crime of assault to commit mayhem and whether there was a labor dispute is of no consequence and absolutely immaterial.

The petitioners were not deprived of any of their constitutional rights. The proof is clear and the record, we respectfully submit, is free from any prejudicial errors.

For the reasons above given, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

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